



# Washington University in St. Louis

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Vice Chancellor for Research

TO: U.S. Department of Defense

RE: DFARS Case 2004—D010  
(DFARS Subpart 204.73 and DFARS Part 252.204—70XX)

FROM: Theodore J. Cicero, Ph.D., Vice Chancellor for Research  
Washington University

Date: October 12, 2005

To Whom It May Concern:

On behalf of Washington University, I write in response to the proposal to amend the Defense Federal Acquisition Regulation Supplement (DFARS) published in the Federal Register on July 12, 2005 (DFARS Case 2004—D010). The proposed rule contains a new DFARS Subpart 204.73, "Export-Controlled Information and Technology at Contractor, University, and Federally Funded Research and Development Center Facilities," and an associated contract clause (DFARS Part 252.204—70XX).

Washington University recognizes the importance of current efforts to protect our country against potential threats and enhance the security of our national research environments. While we support the spirit of these recommendations, we believe the current DOD proposed rule changes are premature, given that the Department of Commerce is still considering the hundreds of comments received in response to its proposed rulemaking concerning the deemed exports requirements for equipment use technology in fundamental university research and other contexts.

Our chief concern with the proposed rule is DOD's failure to clearly and specifically recognize the fundamental research exclusion. The continuing fast pace of technological and scientific development demands a system of regulations that takes into account the unique fundamental research environments of the nation's academic institutions, which rely for their success on international collaboration and a spirit of openness. The failure to recognize the fundamental research exclusion from export control licensing requirements will discourage universities from undertaking DOD-funded research and ultimately force institutions to choose between two undesirable options. Either option—the advent of a partitioned university campus or simply the end of many academic contributions to DOD research activity—damages U.S. national competitiveness and thus U.S. national security in the long run.

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The current proposals will create disincentives for universities to undertake DOD-funded research in the following three ways:

(1) Uncertainty Regarding the Security Classification Mechanism

The 1985 National Security Decision Directive (NSDD) established the "security classification" system as the federal government's policy for controlling information and technology developed through federally-funded research at universities and research institutions. DOD instruction 5230.27 section 4.3 further states that "[n]o other type of control is authorized unless required by law." By not expressly recognizing the fundamental research exclusion from export controls, the July 12, 2005 Federal Register notice will create ambiguity with respect to the application of the NSDD security classification system, and has the potential to subject all DOD-funded research at universities to export control regulations. This inconsistency in compliance requirements between NSDD and the proposals from DOD will inevitably lead to an overly broad application of controls contrary to the regulation, and hence protracted contract negotiations related to export control provisions, significant delays in the management of export licensing, and finally, delay of scientific progress on DOD projects.

(2) Compromising Established Open Research Policies

The current DOD contract proposal will compromise the open research policies of American universities by forcing access control requirements as a matter of contract compliance. If this clause is included in a contract without recognizing the fundamental research exclusion or exemption from controls and licensing, universities will be required to establish segregated facilities to restrict foreign members of the campus community (unless specifically licensed by the government) from access to any export-controlled information or technology. The construction of segregated facilities is contrary to both the open research and anti-discrimination policies of universities nationwide. Universities will face the difficult choice of compliance with DOD contract regulations by altering the normal open campus environment or declining to participate in DOD-funded research.

(3) Incurring Additional Administrative Costs

As more fully discussed in the comment letter of the Council on Government Relations (COGR), and in my own letter of response to Department of Commerce's proposed rule, these contract clauses represent an unfunded mandate. Since the federal government caps the facilities and administrative cost rates of research universities, there would be no chance of recovering those costs represented by the new compliance requirements.

In summary, the proposed contract changes will force universities to choose between two injurious options: declining to participate in DOD-funded research or restricting access to DOD research conducted on university campuses. If we

choose to accept the contract clauses, we will undermine the ability to create new knowledge through international collaboration among the world's outstanding scholars and scientists in an open research environment—the very essence of the university as a place for the free exchange of diverse opinions, information, and ideas.

The long-run impact of these changes, should they become law, are immeasurable. It is certain to become even more difficult to recruit top scientific talent from around the world—students, scholars, and faculty. The difficulty in attracting foreign scholars would reduce the number of international collaborations. Diminishing this key source of scientific discovery and innovation—the contribution of foreign students and scholars—will negatively impact not just Washington University, but America's national and international status as an emissary of innovation in science and engineering.

We think that efforts to enhance national security must be balanced against the benefits that accrue from our nation's leadership in science and medicine. Along with COGR and AAU, Washington University urges the DOD to postpone any rulemaking on this issue pending the outcome of the Commerce rulemaking process and other government policy discussions of the applicability of deemed export controls to use technology in fundamental research. With respect to DOD's proposed rule, we endorse the general recommendations of COGR and AAU to modify the DFARS clause in ways that recognize the fundamental research exclusion or license exemption. It is difficult to understate the importance of international collaboration among the world's outstanding scholars and scientists for the success of research activities in our nation's academic institutions. Instead of tightening export licensing restrictions as proposed in this rule, we ask the DOD to recognize the need to support and secure what constitutes the foundation of America's intellectual and economic leadership in engineering and science: the open and stimulating environment of scientific discovery and creativity in our nation's university research laboratories.

Yours Sincerely,



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